To: New Jersey Law Review Commission
From: Marissa Soistman, Samuel Silver
Re: *State v. Nunez- Mosquea* and *State v. Sherman*
**   Definition of "Harm" in N.J.S. 2C:13-1(c)(1)**
Date: April 06, 2020

M E M O R A N D U M

Executive Summary

The "unharmed release" provision of New Jersey's kidnapping statute, N.J.S. 2C:13-1(c)(1), does not set forth the type of harm contemplated by the statute in order for a defendant to be convicted of first-degree kidnapping.

This provision of the statute has been the subject of litigation in *State v. Sherman*[1] and most recently in *State v. Nunez-Mosquea*.[2] In addition, since the Appellate Division's decision in *Sherman*, the model jury charge for kidnapping has been modified on two separate occasions to address this issue.

Statute Considered

N.J.S. 2C:13-1(c)(1) provides:

[***]

c. Grading of kidnapping. (1) Except as provided in paragraph (2) of this subsection, kidnapping is a crime of the first degree and upon conviction thereof, a person may, notwithstanding the provisions of paragraph (1) of subsection a. of N.J.S.2C:43-6, be sentenced to an ordinary term of imprisonment between 15 and 30 years. If the actor releases the victim **unharmed** and in a safe place prior to apprehension, it is a crime of the second degree. (Emphasis added).

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Background

In March of 2012, a woman was kidnapped at gunpoint and forced into a van by Porfirio A. Nunez-Mosquea (defendant).[3] The defendant drove his victim, Y.S., to a residence not far from the location from which she was taken, and told her to get out of the van without doing "anything

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[1] *State v. Sherman,* 367 N.J. Super. 324 (App. Div), *cert. denied*, 180 N.J. 356 (2004) *overruled in part on other grounds*, *State v. Dalziel*, 182 N.J. 494, 504 (2005).
[2] *State v. Nunez-Mosquea*, 2017 WL 3623378 (App. Div. Aug. 24, 2017).
[3] *Id.*

crazy," while still holding her at gunpoint.[4] Once inside a house, the defendant gagged, kicked, suffocated, and sexually assaulted the victim.[5] The victim fought back, and DNA evidence from Nunez-Mosquea under her fingernails would later be used as evidence in the case.[6] The defendant then walked Y.S out of the house and released her down the street from where she had been held.[7] Y.S. ran to the nearest business and asked the person behind the counter to call 911.[8]

With Y.S.'s assistance, the police were able to locate evidence of the attack, and ultimately, the defendant.[9] From the defendant's apartment and van, the police recovered the clothing worn by the alleged attacker and Y.S.'s college identification, phone, and phone case.[10] The defendant was arrested and charged with first degree kidnapping.[11]

The defendant requested a modification of the model charge for first-degree kidnapping at a charge conference.[12] The defendant maintained that the jury charge should distinguish between the type of harm occurring in every kidnapping from the harm the State must prove to secure a conviction.[13] The charge, he argued, should include that "minimal or insubstantial injuries are insufficient to establish physical harm."[14] The defendant contended that language in *State v. Sherman*, acknowledged a difference between emotional and psychological harm sufficient to satisfy the statute and "the type of harm inherent in every kidnapping."[15] That distinction, he argued, should apply to all harm, not merely psychological harm.[16] His request was denied and the trial court delivered the model charge on first-degree kidnapping in effect at the time of the trial, with no alterations.[17]

The defendant was sentenced to twenty-five years in State prison for first-degree kidnapping.[18] He appealed his conviction of first-degree kidnapping.[19]

Analysis

On appeal, the defendant in *State v. Nunez-Mosquea* argued that the trial court "failed to properly instruct the jury on the "harm" element of the first-degree kidnapping charge [thereby

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[4] *Id.*
[5] *Id.* at *1-2.
[6] *Id.* at *2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at *3. Defendant relied on *State v. Sherman,* 367 N.J. Super. 324 (App. Div), *cert. denied*, 180 N.J. 356 (2004) *overruled in part on other grounds*, *State v. Dalziel*, 182 N.J. 494, 504 (2005).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at *5.
[19] *Id.*

depriving him] of his rights to a fair trial and due process."[20]

New Jersey's kidnapping statute contains a grading provision.[21] This provides that "kidnapping is a crime of the first degree… [but i]f the actor released the victim ***unharmed*** and in a safe place prior to apprehension, it is a crime of the second degree."[22]

• *State v. Sherman*

The question of harm raised by the defendant in *Nunez-Mosquea* were examined by the Court in *State v. Sherman*.[23] In that case, the defendant abducted a child and held her at his mother's home for approximately 24 hours.[24] During that time, he built her a "fort" from couch cushions, and fed her snacks, before deciding he wanted to return her to her parents without receiving a ransom.[25] The defendant dropped her at a shopping mall and instructed her "to run to the first adults she saw and tell them the police were looking for her."[26] Although she appeared to be "good condition, with no signs of physical injury or emotional distress" and that "the man that took her treated her nicely" she was subsequently diagnosed with post-traumatic stress disorder."[27]

In *Sherman*, the Appellate Division specifically rejected the defendant's argument that the victim's anxiety, nightmares and fear constituted only minimal emotional or psychological harm insufficient to support first degree kidnapping.[28] The Court held that "harm in the unharmed release provision of N.J.S.[ ] 2C:13-1(c), includes emotional or psychological harm suffered by the victim."[29] Following *Sherman* the model jury charge for first degree kidnapping was amended twice.[30]

• *Model Jury Charge*

In 2007, the Model Jury Charge for Kidnapping was amended in response to *State v. Sherman* to provide that the State must prove the defendant "knowingly harmed" or "knowingly did not release" the victim in a safe place prior to his apprehension.[31] In addition, the Model Jury

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[20] *Id.* Counsel for the defendant raised two additional points before the Court. In addition, the defendant raised four additional points in his own pro se brief. These points are not germane to the instant memorandum and have been omitted.

[21] N.J.S. 2C:13-1(c)(1).

[22] *Id.* (Emphasis added).

[23] *State v.* Sherman, 367 N.J. Super. 324 (App. Div.) *certif. denied,* 180 N.J. 356 (2004), overruled in part on other grounds, *State v. Dalziel*, 182 N.J. 494, 504 (2005).

[24] *Id.*

[25] *Id.* at 332.

[26] *Id.* at 333.

[27] *Id.* at 333-24.

[28] *Id.* at 330-31, 342.

[29] *Id.* at 330.

[30] *See Model Jury Charge (Criminal)*, "Kidnapping – Permanent Deprivation of Custody" (revised Mar. 5, 2007).

[31] *Nunez-Mosquea*, 2017 WL 3623378 at *6.

Charge clarified that the harm component can include physical, emotional, or psychological harm.[32]

In 2014, the model jury charge for kidnapping was revised once again.[33] This modification provides that: "[i]f the State is contending that the victim suffered emotional or psychological harm, it must prove that the victim suffered emotional or psychological harm beyond that inherent in a kidnapping. That is, it must prove that the victim suffered substantial or enduring emotional or psychological harm."[34]

• *State v. Nunez-Mosquea*

The Appellate Division in *Nunez-Mosquea* observed that "[n]o New Jersey case of which we are aware has ever suggested that there is a difference between the physical harm sufficient to satisfy the released unharmed provision of the statute and "the type of harm inherent in every kidnapping."[35] The Court recognized that, "[i]t may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which [the Legislature] had in mind…" in the kidnapping statute.[36] Those inflicted upon the defendant in this case, however, were "plainly not of that trifling character."[37] Finally, the Court did "not fault the trial court for modifying the charge regarding emotional harm in anticipation of the revision adopted several months after" the defendant's trial.[38]

As of this date, the "unharmed release" provision of New Jersey's kidnapping statute, N.J.S. 2C:13-1(c)(1) does not define set forth with specificity the type of harm contemplated by the statute in order for a defendant to be convicted of first degree kidnapping.

Pending Legislation

There is no legislation currently pending regarding N.J.S. 2C:13-1(c) regarding the use of "harm" in the statute.

Conclusion

Staff requests authorization to conduct additional research to determine whether it would be useful to clarify the definition of "unharmed" in N.J.S. 2C:13-1(c) to address emotional or psychological harm suffered by a victim.

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[32] *Id. See Model Jury Charge (Criminal)*, "Kidnapping – Permanent Deprivation of Custody" (revised Mar 5, 2007).
[33] *Model Jury Charge (Criminal)*, "Kidnapping" (revised Oct. 6, 2014).
[34] *Nunez-Mosquea*, 2017 WL 3623378 at *7 quoting *Model Jury Charge (Criminal)*, "Kidnapping" (revised Oct. 6, 2014).
[35] *Nunez-Mosquea*, 2017 WL 3623378 at *7
[36] *Id.* at *7 citing *Robinson v. United States*, 324 U.S. 282, 285 (1945).
[37] *Id.*
[38] *Id.* at *8.